Filed 1/8/02

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. EUGENE JAMAR MASSEY, Defendant and Appellant.	2d Crim. No. B148256 (Super. Ct. No. TA039715) (Los Angeles County)

Eugene Jamar Massey appeals a judgment after conviction of first degree murder with a finding that he personally used a firearm. (Pen. Code, §§ 187, 189, 12022.5, subd. (a)(1).) We conclude that the trial court properly admitted a tape of a 911 emergency call. It did not err by instructing the jury with CALJIC No. 17.41.1 and it correctly rejected Massey's request for an instruction on voluntary manslaughter. We affirm.

FACTS

Massey, whose nickname is "Knockout," and Darryl Johnson had an argument during a dice game. Johnson pushed him and Massey left. About 20 minutes later, Massey returned with a gun.. From Johnson's front door, Massey

called him to come outside and said he was "gonna get him." Massey left after Johnson did not respond.

The next day, Johnson was standing in front of an apartment house talking to friends when Massey approached him. Johnson said, "what's up, Knockout," and Massey replied, "nothing but maintaining." Elbert Perry, who was standing near Johnson, testified that Massey pulled a gun from his waistband and shot Johnson. Johnson died within a few minutes from the bullet wound to the chest.

Susie Perry, Elbert's mother, was at home and heard the gunshot. She went to her porch and saw Massey running. She stated, "he looked like he was scared, like he was trying to leave from something, run from something."

Police officer Roger Forest went to the scene of the shooting and saw Johnson laying face down. He testified that Johnson's pants were at his knees and his buttocks were exposed.

The prosecution sought to introduce a tape of a 911 emergency call. Massey objected on the ground that it was hearsay and not a spontaneous utterance. The court overruled the objection and played the tape for the jury.

The tape starts with a call originated by the 911 dispatcher who stated they were calling back because the caller on the first call hung up the telephone. Shola Gibbs, an 11-year-old girl, was on the other end of the line. The dispatcher told Gibbs to "calm down" and asked for the name of the shooter. Gibbs said "his name [is] Knock Out . . . ." She said she saw Massey shoot Johnson. The dispatcher questioned Gibbs about his physical description. Gibbs said he was black, short, between 18 to 23 years old and wore a gray sweatshirt and black pants. An unidentified person on the tape said that Massey had black eyebrows.

Ceclia Thorn testified that after the shooting Gibbs went to her home and was crying.

In the defense case, Melanie Mims testified that Massey was her boyfriend. On the day of the shooting, Massey was at her house and they went shopping together.

Massey testified that he did not shoot Johnson and was not at the scene of the shooting. He did not threaten Johnson and had no "ill feelings or hard feelings" about him.

The trial court rejected Massey's request to instruct the jury on the lesser included offense of voluntary manslaughter. It found there was "no heat of passion evidence."

After the guilty verdict, the court denied Massey's motion for a new trial. It found Gibbs' voice on the tape was "an excited utterance, and it appears reliable to me after hearing the tape." It found there were other voices on the tape but that was "background noise." The court found that the important part of the tape involved what Gibbs saw.

DISCUSSION

I. Admission of the 911 Call

Massey contends the 911 call from Gibbs was inadmissible hearsay because it was not a spontaneous utterance. We disagree.

Out-of-court statements are hearsay. But a spontaneous statement made by a witness "under the stress of excitement" about an exciting event is admissible as an exception to the hearsay rule. (*People v. Raley* (1992) 2 Cal.4th 870, 892; Evid. Code, § 1240.) "A spontaneous statement is one made without deliberation or reflection. [Citation.]" (*Raley*, at p. 892.) A tape of a 911 call containing such a statement is admissible. (*People v. Hernandez* (1999) 71 Cal.App.4th 417, 425.) We review the trial court's ruling to decide whether it abused its discretion. (*Raley*, at p. 894.)

Massey contends that someone coached Gibbs. But from the 911 call tape the trial court could reasonably infer that this did not happen. Gibbs told the operator she saw Massey shoot Johnson. Without hesitation she answered the operator's questions about Massey's physical description. She told the operator Massey was black, short, between 18 to 23 years old and wore a gray sweatshirt and black pants. An unidentified voice on the tape stated Massey had black eyebrows. There were some other voices in the background. But this neither shows that Gibbs was coached nor that the court could not determine who provided the answers. Massey has not shown that the court erred by finding Gibbs' statements reliable and the other voices on the tape insignificant.

Massey contends Gibbs' statements were not spontaneous because she was responding to the operator's questions in a second call. But the trial court found that the "call-back" was "part of the same transaction" and Massey has not shown otherwise. Massey states Gibbs had time to reflect on her answers. But statements do not necessarily lose their spontaneity if a witness makes them during questioning or even after a lapse of time. (*People v. Raley*, *supra*, 2 Cal.4th at p. 893.) The critical element is the mental state of the speaker. (*Id*. at p. 892.)

Gibbs was an 11-year-old girl who had just witnessed a shooting. She went to a neighbor's home and was crying. Massey contends that Gibbs' remark that he was the shooter was neither excited nor reliable. But "'[t]he remark followed hard upon an event - a shooting - likely to produce the utmost in excitement and shock and to ensure the utterance's spontaneity and, presumably, its truthfulness.' [Citation.]" (*People v. Farmer* (1989) 47 Cal.3d 888, 906, disapproved on other grounds in *People v. Waidla* (2000) 22 Cal.4th 690, 724, fn. 6.) She identified Massey shortly after the operator told her to calm down. The trial court was in the best position to assess the tone of her voice. Massey has not shown why it could not reasonably find her statements to be excited and reliable. Moreover, Massey

has not shown that Gibbs' remarks were either self-serving or that she had a motive to lie. He has not shown an abuse of discretion.

But even if the court erred, it is not reasonably probable that absent the error Massey would have received a more favorable result. In denying a new trial, the court found "there was a significant amount of evidence besides the tape." Elbert Perry testified he saw Massey shoot Johnson. Susie Perry saw him run from the scene with a frightened expression. Massey went to Johnson's house with a gun the day before the shooting and threatened he was "gonna get him."

II. Instruction on Voluntary Manslaughter

Massey contends the trial court erred by not instructing the jury on the lesser included offense of voluntary manslaughter. We disagree.

The trial court must instruct on voluntary manslaughter where there is substantial evidence to show commission of that offense. (*People v. Sinclair* (1998) 64 Cal.App.4th 1012, 1016.) Voluntary manslaughter involves killing a person without malice aforethought in the heat of passion after adequate provocation. (*People v. Gaulden* (1974) 36 Cal.App.3d 942, 951-952.) Where the evidence does not show these elements, the trial court does not err by not giving this instruction. (*Id*. at p. 951.)

The evidence shows a killing with premeditation, not provocation. On the day before the shooting, Massey went to Johnson's home with a gun and made a threat that he was "gonna get" Johnson. The next day, Massey walked up to Johnson, pulled a gun from his waistband and shot him. Before Massey pulled his gun, Johnson stated, "what's up, Knockout?" But there was no evidence of a fight or any provocation by Johnson. He was standing in front of an apartment building, talking to friends, when Massey approached him. "A trial court need not instruct on manslaughter where the evidence indicates a no lesser crime than murder in the first degree. [Citation.]" (*People v. Gaulden, supra*, 36 Cal.App.3d at p. 951.)

Massey states that after the shooting officer Forest saw Johnson laying face down with his buttocks exposed. He contends this shows Johnson "mooned" him, thus providing provocation for voluntary manslaughter. But there is no evidence this occurred. Neither Massey nor any witnesses in the defense case testified that happened. Massey may not claim instructional error based on speculation. (*People v. Gaulden*, *supra*, 36 Cal.App.3d at p. 951.) Nor has he shown how a reasonable person would be provoked to shoot someone because of a "moon." (*People v. Lucas* (1997) 55 Cal.App.4th 721, 740.)

Moreover, Massey testified he did not shoot Johnson and was not present when the shooting occurred. In his defense, he presented no evidence that he killed Johnson in the heat of passion. There was no substantial evidence to support a voluntary manslaughter instruction. (*People v. Sinclair, supra*, 64 Cal.App.4th at pp. 1019-1020.)

In *Sinclair*, the defendant was convicted of second degree murder. He testified he did not shoot the victim and was not present when the shooting occurred. The Court of Appeal rejected his contention that he was entitled to a voluntary manslaughter instruction because he testified he did not shoot the victim. (*People v. Sinclair, supra*, 64 Cal.App.4th at pp. 1019-1020.) It stated, "the duty to instruct on inconsistent defenses does not extend to cases such as this where the sworn testimony of the accused completely obviates any basis for finding a lesser included offense." (*Id*. at pp. 1021-1022.) "When defendant denied he shot the decedent, none of the alleged evidence of heat of passion . . . was of the type 'that a reasonable jury could find persuasive.' [Citation.]" (*Id*. at p. 1021.) Because the facts of this case fall squarely within the *Sinclair* rule, the trial court did not err by not giving the instruction.

But even had the court erred, the absence of this instruction caused no prejudice. "[E]rroneous failure to instruct on a lesser included offense is not

prejudicial where 'the factual question posed by the omitted instruction was necessarily resolved adversely to the defendant under other, properly given instructions.' [Citation.]" (*People v. Millwee* (1998) 18 Cal.4th 96, 157.)

The jurors had the choice of convicting Massey of first degree murder or murder in the second degree. The court instructed them that murder in the second degree did not involve deliberation and premeditation. (CALJIC No. 8.30.) Murder in the first degree required a cold, calculated decision, not "a rash impulse." (CALJIC No. 8.20.) It instructed them that if they had a doubt as to whether it was first or second degree murder, they had to return a verdict of second degree murder. (CALJIC No. 8.71.) In finding Massey guilty of first degree murder, the jury found deliberation and premeditation. (CALJIC No. 8.20.) It necessarily decided that Massey did not act in the heat of passion. (*People v. Mincey* (1992) 2 Cal.4th 408, 438-439; *People v. Thompkins* (1987) 195 Cal.App.3d 244, 251 [premeditation and heat of passion are "mutually exclusive" concepts].)

Moreover, the evidence in this case fell within either one of two mutually exclusive categories, murder or alibi. The jury rejected Massey's alibi. It thus was not reasonably probable that Massey would have received a better result had the court given the voluntary manslaughter instruction. (*People v. Breverman* (1998) 19 Cal.4th 142, 177-178.)

III. CALJIC No. 17.41.1

Massey contends the trial court erred by instructing the jury with CALJIC No. 17.41.1. He concedes he did not object to the instruction at trial. This waived his claim of instructional error. (*People v. Guiuan* (1998) 18 Cal.4th 558, 570.) But even on the merits his claim fails.

Massey contends his right to a jury trial was violated because the instruction invades the secrecy of the process, the independence of each juror, and the jury's right of nullification. The instruction provides: "The integrity of a trial

requires that jurors, at all times during their deliberations, conduct themselves as required by these instructions. Accordingly, should it occur that any juror refuses to deliberate or expresses an intention to disregard the law or to decide the case based on penalty or punishment, or any other improper basis, it is the obligation of the other jurors to immediately advise the Court of the situation."[1] (CALJIC No. 17.41.1 (1998 new) (6th ed. 1996).)

Although a jury, as a practical matter, may have the power to engage in nullification, it has no right to do so. (*People v. Williams* (2001) 25 Cal.4th 441, 453-456; *People v. Cline* (1998) 60 Cal.App.4th 1327, 1335.) Courts may not instruct the jury that it has the power of nullification. (*Ibid.*; see also *People v. Baca* (1996) 48 Cal.App.4th 1703, 1707.) Jurors must follow and apply the law as instructed and decide the case upon evidence presented at trial. (*Williams*, at pp. 453-456; *Baca*, at p. 1707.) An instruction obligating each juror to disclose any juror's refusal or expressed intention to disregard the law is consistent with this duty. It is neither coercive nor intrusive. It only informs the jury of its duty to decide the case based on the evidence and the law. (*People v. Molina* (2000) 82 Cal.App.4th 1329, 1335.)

The instruction has neither a chilling effect on jury deliberations nor does it undermine a juror's independence. Jurors are instructed to deliberate, they are not told to abandon their view of the evidence in favor of the view of the majority. Moreover, this instruction preserves the defendant's right to a fair trial. It allows a holdout juror to inform the court when the majority is unlawfully trying to convict a defendant. (*People v. Sanchez* (1997) 58 Cal.App.4th 1435, 1446, fn. 2.) The trial court did not err.

---

[1] The validity of CALJIC No. 17.41.1 is pending before the California Supreme Court. (*People v. Engelman* (2000) 77 Cal.App.4th 1297, review granted Apr. 26, 2000, S086462; *People v. Taylor* (2000) 80 Cal.App.4th 804, review granted Aug. 23, 2000, S088909; *People v. Morgan* (2000) 85 Cal.App.4th 34, 40,

Should our Supreme Court decide it is error to give CALJIC No. 17.41.1, reversal would be required only if there is a showing of prejudice. (*People v. Molina*, *supra*, 82 Cal.App.4th 1329, 1335-1336; *People v. Flood* (1998) 18 Cal.4th 470, 502-503.) Massey makes no showing that any juror was either coerced or prevented from making their own free and independent decision. We find nothing in the record that CALJIC No. 17.41.1 affected the verdict in any way. Massey has not shown prejudice.

The judgment is affirmed.

NOT TO BE PUBLISHED.

GILBERT, P.J.

We concur:

YEGAN, J.

PERREN, J.

---

review granted Mar. 14, 2001, S094101.)

Ron Slick, Judge

Superior Court County of Los Angeles

Christopher Blake, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Kenneth C. Byrne, Supervising Deputy Attorney General, and Michael W. Whitaker, Deputy Attorney General, for Plaintiff and Respondent.